LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 3 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-164

VIRGINIA STAGE LINES, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WARREN WOODS
LEONARD APPEL
BETTY SOUTHARD MURPHY
Suite 1032 Pennsylvania Building
425 - 13th Street, N. W.
Washington, D. C. 20004
Attorneys for Petitioner

Of Counsel:

WILSON, WOODS & VILLALON
Suite 1032 Pennsylvania Building
425 - 13th Street, N. W.
Washington, D. C. 20004

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
Reasons for granting the writ	13
Conclusion	20

Appendix A:

Opinion of the Court Below	1a

Appendix B:

Judgment	11a
Order Denying Petition for Rehearing	12a

Appendix C:

Trial Examiner's Decision	13a
Decision and Order of the National Labor Relations Board	26a

CITATIONS

CASES:

Alamo Express, Inc. and *Alamo Cartage Company* v. *National Labor Relations Board* No. 896, certiorari denied, January 25, 1971	17
American Shipbuilding Company v. *National Labor Relations Board*, 380 U.S. 300	15
Communications Workers v. *National Labor Relations Board*, 362 U.S. 479	14
Fibreboard Paper Products v. *National Labor Relations Board*, 379 U.S. 203	15

Page

Lenkurt Electric Co., Inc., 177 NLRB No. 87 11
National Labor Relations Board v. *Cheney California Lumber Co.*, 327 U.S. 385 14
National Labor Relations Board v. *Erie Resistor Corp.*, 373 U.S. 221 18
N.L.R.B. v. *Everist, Inc.*, 334 F. 2d 312 .....10, 20
National Labor Relations Board v. *Illinois Bell Telephone*, 189 F. 2d 124 *cert. den.*, 342 U.S. 885 20
National Labor Relations Board v. *Insurance Agents International Union, AFL-CIO*, 361 U.S. 477 ....15, 19
National Labor Relations Board v. *Rockaway News Supply Co., Inc.*, 345 U.S. 71 18
National Labor Relations Board v. *Southern Greyhound Lines*, 426 F. 2d 1299 19
NLRB v. *Union Carbide Corporation*, 440 F. 2d 54 ....11, 12, 19
Nuodex Division of Tenneco Chemicals, Inc., 176 NLRB No. 79 11
Overnite Transportation Company, 154 NLRB 1271 enforced *sub nom. Truck Drivers and Helpers Local No. 728* v. *National Labor Relations Board*, 364 F. 2d 682 17
Redwing Carriers, Inc., 137 NLRB 1545, enforced *sub nom. Teamsters Local 79* v. *National Labor Relations Board*, 325 F. 2d 1011, certiorari denied, 377 U.S. 905 .....17, 18
Smith Transit, Inc., 176 NLRB No. 141 11
Transcontinental Bus System, Inc., 178 NLRB No. 110 .6
Truck Drivers Local 413, Teamsters v. *National Labor Relations Board*, 334 F. 2d 539 18
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 19

STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)

Section 1(b) 3, 13
Section 7 .....3, 5, 19
Section 8(a) 3, 5, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

VIRGINIA STAGE LINES, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Virginia Stage Lines, Inc., prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A to this petition, *infra,* pp. 1-10) is reported at 441 F.2d 499. The decision and order of the National Labor Relations Board (App. C, *infra,* pp. 13-28) are reported at 182 N.L.R.B. 107.

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 11) was entered on May 10, 1971. Petitioner's timely petition for rehearing *en banc* was denied on May 5, 1971 (App. B, *infra,* p. 12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board has exceeded its powers and intruded into an area of regulation barred by statute in treating as "concerted" activity meriting statutory protection, the separately delivered ultimatums of two non-union employees whose objections were not to crossing the picket lines established at their employer's premises by union employees based elsewhere, but only to the particular assignment they were requested to perform.

More specifically, whether the Board may accord statutory protection to these and all other employees who adopt this posture, and concomitantly, order an employer not to discriminate against such employees during the course of strike if they refuse to perform work which the strikers—of the same or any other employer—"contend would normally be performed by them".

2. Whether the holding of the court below with respect to the issue it framed for decision, conflicts with those of other circuit courts of appeals.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

* * * * * * *

Section 1(b) "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, . . ."

* * * * * * *

Section 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

* * * * * * *

Section 8(a) "It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

STATEMENT

1. This case is an exceptional one in the annals of the National Labor Relations Board (the Board) in that it is the vehicle for introducing a novel doctrine in the regulation of industrial labor relations together with

a newly devised remedy for its implementation and enforcement. Both facets are glossed over, in the first instance, by the Trial Examiner in his decision and, more importantly, left without the benefit of explication by the Board itself. As if this were a run-of-the-mill case with no unconventional features, the Board, by a three member panel, adopted the Trial Examiner's decision *in toto,* through the so-called short form—or "rubber stamp"—technique of affirmance (App. C, pp. 26-27).[1]

Compounding this initial lapse in the discharge of adjudicatory responsibility, the opinion of the reviewing court below—even as the Board's presentation in that forum—fails to examine and come to grips with the innovations that distinguish the Board's decision and order, which were nevertheless enforced in full.

2. Petitioner, an interstate bus line, operates in part out of a terminal in Washington, D. C. While petitioner's regular service is channelled primarily to destinations south and west in Virginia and West Virginia, it is authorized to operate charter trips to the north and, indeed, from its route to any point in the country (J.A. 89).[2] The charge in the case at bar was filed on behalf of two (out of a total of 175) unorganized drivers in petitioner's Eastern division covering Washington, D. C., who on different occasions re-

[1] The Board made an insignificant modification of no relevance here, in the phraseology of that part of the Order requiring the petitioner to offer the two employees involved, substantially equivalent employment in the event their former jobs "no longer exist" (App. C, p. 27).

[2] "J.A." refers to the Joint Appendix filed with the court below, containing those portions of the record necessary for judicial review.

fused to operate a northbound charter run in the factual context detailed below. The resulting question was whether they had thereby engaged in 'concerted activities'' within the meaning of Sections 7 and 8(a)(1) of the National Labor Relations Act (the Act) and thus acquired special statutory rights immunizing them from discharge.

With respect to petitioner's labor relations approach, it had never been charged with any unfair labor practice in some three decades of operation (J.A. 61). While, over the years, various unions failed to win in a number of Board supervised elections in petitioner's Eastern division, employees in its Western division—not involved here—have long been represented by a labor organization in their dealings with petitioner (J.A. 60-62, 121-127). The Board's decision in this case specifically absolves petitioner of any anti-union animus or discriminatory activity of the kind broadly proscribed by the Act (App. C, pp. 19-20); instead, its findings of unfair labor practices rest on narrow and highly technical grounds.

Petitioner and a second bus line, Safeway Trails, Inc. (Safeway), both subsidiaries of Continental Trailways, Inc., operate regularly scheduled runs from the same terminal in Washington, D. C., the facilities of which are also shared by other bus lines (J.A. 106). Still a third company, Trailways Terminal of Washington, D. C., operates the terminal and, acting through its Tour Office, serves as promotional as well as booking agency or clearing house for charter trips developed in the Washington zone (J.A. 106). Apportionment of the charter business as between the two bus lines is made on the basis of a quota preestablished by their general managers on the basis of personnel

and equipment available for the peak tour season (J.A. 104-105). The practice was to assign the northern charter runs largely to Safeway, since its regularly scheduled service was primarily to the north and east of Washington, and the southern charter runs to petitioner. However, if either company's quota were exhausted or its equipment or manpower unavailable when needed, the Trailways Terminal would assign a northern run to petitioner or, conversely, a southern run to Safeway (J.A. 105-106). If neither could handle the particular charter trip, other available Trailways carriers or non-affiliated companies would be sought (J.A. 106).[3]

As separately managed entities, petitioner and Safeway each has its own distinctive labor relations policy. In a dispute over contract terms, the unionized drivers of Safeway, in April 1969, launched a strike which continued for some five months, in the course of which they established picket lines around the Washington terminal and the related garage, located some miles away (J.A. 9-10, 132). Petitioner maintained normal operations, despite the picketing of these facilities; its drivers, as well as those of other carriers, consistently—and without complaint—crossed the picket lines in the pursuit of their daily work routine (J.A. 9-10).

---

[3] Both petitioner and Safeway are members of the National Trailways Bus Association, a trade association, which was established in 1935 by various companies independent of Greyhound Lines, Inc. in order to provide effective competition to Greyhound. They often share terminal space and maintain integrated schedules (J.A. 10-11; footnote 2, *Transcontinental Bus System, Inc.*, 178 NLRB No. 110 (1969)). Capitol Buslines, for example, which operates out of the Washington terminal, is an independent carrier having no connection with either Safeway or petitioner, except that it also belongs to the National Trailways Bus Association (J.A. 106).

As a result of the economic strike, Safeway discontinued its regular runs but continued to operate charter trips, in the same manner as before although on a necessarily curtailed basis, with resort to a reduced force composed of non-striking personnel (J.A. 96, 106-108). Petitioner's charter operations expanded during the strike with an appreciable increase in its daily trip quota; the remaining overflow of charters, many of which had been booked long before the strike, was absorbed by other carriers operating out of the Washington area (J.A. 106-108, 114).

Against this background, the developments ensued culminating in the discharge by petitioner of the two driver-employees in question. Both Charles Tallent and Richard Loughhead were drivers on a so-called "extra board" status—that is, because of comparatively low company seniority, they were assigned in rotation with the others in this classification to charter trips and as substitutes on regularly scheduled runs or to operate special sections (J.A. 19, 26, 66, 85). On several occasions, before and after the onset of the Safeway strike, both drivers had taken charter assignments to destinations north of Washington (J.A. 20-21, 23, 35-56); the separate episodes resulting in their discharge, arose two months or more after the strike began; and at no time did either exhibit any qualms about crossing the picket lines.

Loughhead, on Sunday morning, June 1, refused to take a charter assignment requiring a round trip to New York, because, as he advised the dispatcher—and subsequently petitioner's supervisory staff—he had been threatened by a group of pickets with harm to his vehicle and person (J.A. 23-24, 133). Petitioner's General Manager and senior operating official, Carl

Harmon, on being summoned from his home, sought to assuage Loughhead and offered assistance with respect to the threats, giving him until midnight as a "fair . . . and reasonable" period to decide and communicate his willingness to accept the assignment, since petitioner could not tolerate a driver seeking to "pick and choose", under its system of rotating assignments (J.A. 63, 64-65). Notwithstanding Harmon's admonition that he would otherwise be "voluntarily terminating his employment", Loughhead permitted the time to expire without agreeing to return to work (J.A. 24, 28, 63).

However, several days later, Loughhead notified his Divisional Supervisor that if the "rest of the drivers" continued to accept northbound charters, he would do likewise (J.A. 29, 98). Loughhead was subsequently advised by General Manager Harmon, to whom he had been referred, that petitioner could not return him to the extra board because of his failure to signify an intention, prior to the expiration of the Sunday midnight deadline, to take his proper turns there (J.A. 29, 64-65).

In this same period, on June 8, two other drivers balked at taking northbound charters (J.A. 77). On being informed by a company official that they would be permanently removed from the extra board if they persisted, the pair agreed to accept any and all assignments in their turn, and there was no further incident (J.A. 78-80).

Finally, with respect to Tallent, on Sunday, June 10, he declined to take a northbound charter trip on the ground that he had been threatened by the pickets and that he regarded the trip as "Safeway work" (J.A.

43, 93). Sustained efforts by petitioner's assistant general manager to dissuade him, including an offer of protection with respect to the threats, were unavailing (J.A. 81, 82). Tallent was reminded that he had been excused two months earlier from taking a New York charter run because of a plea of illness (J.A. 66) but that if, under the present circumstances, he refused his regular turn on the extra board, this would be tantamount to "resigning" (J.A. 42, 135). Tallent thereupon considered himself "fired" and made no subsequent overtures toward reinstatement (J.A. 42).[4]

As an aftermath, the requests for a transfer to Richmond, Virginia of two Washington extra board drivers were cancelled after Loughhead and Tallent were terminated because of the need for experienced extra board men in Washington (J.A. 93-94).

The Board Rests Upon Its Trial Examiner's Decision

3. The Board, having adopted the Trial Examiner's decision and recommendations without evaluation or comment, ratified his theory of the case (App. C, p. 26).

The decision at this level dismissed allegations that Loughhead and Tallent were discriminated against because of union activities (or that petitioner interrogated any employees concerning their union activity), with the finding that petitioner was not shown to be aware of any organizational activity or that its approach to these two drivers "was harsher than to other drivers who originally refused to take charter trips

[4] As a consequence, the charter trip was cancelled and petitioner was required to refund the initial trip deposit (J.A. 86). In the earlier instance of Loughhead's refusal of his assignment, petitioner was required to hire a bus and driver in New York to return the passengers to their destination (J.A. 76).

north" (App. C, pp. 19-20). However, the Board held that the men were discharged in violation of Section 8 (a) (1) of the Act, for engaging in statutorily protected concerted activity in the interests of a labor organization, on the ground that they "were making common cause with the Safeway strikers" by refusing to drive northbound charters and were thus assisting the striking union (App. C, p. 20).

The full weight of the decision rests upon the premise that the "Board has repeatedly held that employees who respect a picket line of striking employees are thereby engaging in protected concerted activity" and that the "*action of the employees in this case in refusing to drive northbound charters was equivalent to their respecting the picket lines and hence enjoyed statutory protection*" (App. C, p. 21). (Italics supplied.)

Further equating this case with those in which there was simply a refusal to cross a picket line, the Board held that the mantle of protection for such concerted activity extends "*a fortiori*" to the two employees here involved, since their employer is a "sister corporation of the struck company" and the work refused "in all probability normally would have been performed by the struck company" (App. C, p. 21). In this connection, the Board singles out the dissenting opinion in a leading case decided by the United States Court of Appeals for the Eighth Circuit, *N.L.R.B.* v. *Everist, Inc.*, 334 F.2d 312 (1964), as correctly stating the law (App. C, p. 21).

Applying its now familiar maxim, in the line of cases on which it relies, the Board held that while petitioner was "of course, free to replace . . . or indeed to discharge" the two drivers if that were "reasonably nec-

essary", its action was in "reprisal" for their concerted activity and not in order "to carry on its business," since they had not been permanently replaced (App. C, p. 21).

In addition to ordering reinstatement of the two drivers with back pay, the Board—in a sharp departure from the well-nigh standard order which has characterized the class of cases it cites [5]—requires petitioner to refrain from discrimination against "any employee" who "has assisted a labor organization *by refusing during the course of a strike to perform work which the strikers contend would normally have been performed by them*" (App. C, p. 23). (Italics supplied.) In the same vein, petitioner is directed to post a notice to its employees that it will not discharge or otherwise discriminate against any of them *"for refusing during the course of a lawful strike, to perform work which the strikers contend would normally be performed by them"* (App. C, p. 25). (Italics supplied.)

The Court of Appeals Decision

4. The Board's order was enforced by a divided court of appeals (Judges Butzner and Craven, Judge Bryan dissenting). Reverting to its earlier decision in *NLRB* v. *Union Carbide Corporation*, 440 F.2d 54 (C.A. 4,

---

[5] *"Lenkurt Electric Co., Inc.*, 177 NLRB No. 87, and the cases there collected. . . ; *Smith Transit, Inc.*, 176 NLRB No. 141, and the cases there discussed . . . ; *Nuodex Division of Tenneco Chemicals, Inc.*, 176 NLRB No. 79, and the cases there cited . . . ." (App. C., p. 21).

Typically the employer in these cases is ordered to cease and desist from "discharging or refusing to reinstate any employee because he has assisted a lobor organization *by refusing to cross a lawful picket line at his place of work."* (Italics supplied.) *Lenkurt Electric Co., Inc.*, 177 NLRB No. 87.

1971), the court believed that this case presented the question whether the Act protected an employee "*who refused as a matter of principle to cross a picket line maintained by fellow employees at his employer's place of business*" regardless of whether the striking union was his bargaining representative (App. A, p. 5). (Italics supplied.) Answering in the affirmative, the court announced its agreement with the Fifth Circuit that such an employee "has in effect plighted his troth with the strikers . . . and thus become a striker himself" (App. A, p. 5). It equated this case with the decisions of the Fifth and Sixth Circuits to this effect.[6]

At the same time, the court below recognized that "the rule against partial strikes is unquestioned" and declared it was not holding that employees "could engage in a slowdown, or in any way decline to perform all their assigned work and yet remain on the job entitled to their pay" (App. A, p. 7). However, the court was of the view that this principle was not applicable in the circumstances here (App. A, p. 7), fn. 5).

The dissenting opinion below is based on the proposition that the dischargees were simply actuated by fear of personal harm in their refusal to perform their jobs, thus disqualifying them from having made "common cause" with the strikers, such as to merit protection under Section 7 of the Act. This principle, the dissenting judge emphasized was enunciated in *NLRB* v. *Union Carbide Corporation, supra,* which, he stated, the majority "now completely repudiates" (App. A, pp. 9-10).

---

[6] Citing: "NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1301 (5th Cir. 1970); accord, NLRB v. Difco Laboratories, Inc., 427 F.2d 170 (6th Cir. 1970); contra, NLRB v. Illinois Bell Telephone, 189 F. 2d 124 (7th Cir.), *cert. denied,* 342 U.S. 885 (1951)." (App. A, p. 5).

REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals, endorsing the exercise by the Board of statutory powers it does not possess, is inconsonant with the Congressional grant of regulatory authority in the Act. If the judgment below is permitted to stand, the breech invites widening by other such unwarranted incursions, and will promote disruption of labor-management equilibrium in industry, contrary to the legislative goal expressed in Section 1(b) of the Act.

The factual simplicity of this case renders all the more inexplicable the camouflage that has somehow obscured the underlying issues, which escaped the attention of the court below. The undisputed record shows two employees who—along with their fellow drivers numbering almost two hundred—never once objected to crossing the picket lines, but after having done so for weeks on end, sought to dictate the nature of the work they were willing to perform; i.e., they would accept trip assignments to one geographical area but not another. These employment conditions were viewed by the Board as constituting conduct "equivalent to their respecting the picket line" and, on this basis, deserving of "statutory protection".

In seeking to follow the Board's reasoning on this score, logic soon gives way to an absurd riddle: When is *crossing* a picket line, as here, "equivalent" to *not crossing* (or "respecting") a picket line? The answer to this exercise in fantasy apparently is—whenever the Board would have it so.

In reality, the Board's semantics, if judicially approved, would equip this regulatory agency with a veritable magic formula for opening, at will, any door to the innermost managerial recesses of the business or

industrial complex, a result never contemplated by the framers of the Act. Indeed, the Board offers a new concept in industrial relations—that of a portable picket line which can be moved, figuratively speaking, from outside the plant or establishment to confront a general manager at his very office door, or otherwise set down inside the gates to surround any segment of operations which employees may wish to isolate. In short, the justification which the Board advances—when stripped, as it must be, of support from the unrelated cases on which the Board relies, dealing as they do with a recognizable refusal to cross a tangible picket line (*supra,* p. 11 fn. 5)—breaks down into a contradiction in terms, without support in reason or authority.

Of even more serious concern to us—and, we think, potentially to countless employers across the land who assiduously seek to comply with the Act, in spirit and letter—are the far reaching and harmful implications of the remedy which the Board, without explanation, has synthesized to deal with what, even in its own terms, was a technical violation. We urge that, if for no other reason, full dress review is warranted with a view to the Court's striking down the order in question, if our position on the merits is sound. Compare: *National Labor Relations Board* v. *Cheney California Lumber Co.,* 327 U.S. 385, in which this Court declared judicial enforcement of an order is unwarranted "if the Board has patently traveled outside the orbit of its authority so that, there is, legally speaking, no order to enforce" (327 U.S. at 388-389; cf., *Communications Workers* v. *National Labor Relations Board,* 362 U.S. 479.

The fatal flaw of the order we seek to challenge here, as in the court below, is that it does violence to the

accepted principle that that Board has no jurisdiction to police the employer's internal prerogatives. *American Shipbuilding Company* v. *National Labor Relations Board,* 380 U.S. 300, 318 (1965) (concurring opinion of Mr. Justice White); *Fibreboard Paper Products* v. *National Labor Relations Board,* 379 U.S. 203, 217 (1964) (concurring opinion of Mr. Justice Stewart). Compare also: *National Labor Relations Board* v. *Insurance Agents International Union, AFL-CIO,* 361 U.S. 477, in which the Court blocked the Board from "movement into a new area of regulation which Congress had not committed to it" vis à vis the latitude reserved to unions in the collective bargaining process (361 U.S. at 499).

The vulnerability of the order, an issue on which the opinion below is completely silent, may be seen at a glance. Petitioner though found free of anti-union bias is, for the indefinite future, made an open and defenseless target for the consequences of strikes emanating from any quarter, including not only those conducted by the employees of another friendly company, but those of a rival concern, as well.

The Board requires petitioner to notify its entire work force that for the duration of such a "lawful" strike, "any employee", acting singly or in concert, is given license to refuse "to perform work" assignments of the particular kind or category that the strikers *contend* would *normally* be performed by them (*supra,* p. 11). Thus one or more petitioner's employees—on the basis of the mere claims of strikers, made while zealously pressing the cause of their union located elsewhere—have free rein to play havoc with the everyday conduct of an enterprise, in whatever critical department, by refusing to perform a specific part of their regular duties. The refusal, so legitimatized by the Board, need only be premised on what the

strikers "contend" at any given time would "normally" be theirs to do, in order to qualify for special protection under the Act. Conspicuously absent, it may be seen, is any suggestion by the Board of criteria or standards for ascertaining whether the "claim" of the strikers, on which so much hinges, is meritorious or preposterous. The disastrous consequences that could thereby overtake a sophisticated transportation system like the one here involved, whose service is integrated with other nearby lines separately operated (regardless of whether they be considered separate or common employers), are easily envisaged.

The treatment accorded this case by the Board, from the content of the Trial Examiner's initial decision to the litigation posture assumed by the Board before the court of appeals, illuminates the substantiality of the question urged for review. The Board did not see fit to disturb the Trial Examiner's decision, notwithstanding that the document offered no discussion or exposition of his newly-minted remedy or the implementing cease and desist order, as we have noted. As for precedent to buttress the unfair labor practice findings, the Trial Examiner adverted to a series of Board cases, a common element of which was the traditional refusal to cross the traditional picket line, visible to the naked eye. Invariably, the Board's remedy in those cases consisted of a standard cease and desist order barring discrimination against an employee assisting a labor organization by "refusing to cross a lawful picket line at his place of work" (*supra,* p. 11, fn. 5), an order vastly different from the one evolved here.

Apparently taking the cue from this curious reliance, the Board's brief in the court below, in the same mistaken vein, is replete with references to an imaginary refusal to cross a picket line, as the touchstone for its

argument and authorities.[7] Lost sight of entirely was the fragile thread in the Trial Examiner and Board's decision that the employees conduct was "equivalent" only to "their respecting the picket lines" (*supra*, p. 10).

While within the legitimate bounds of advocacy, this misleading approach serves only to hopelessly confuse the issue, since the Board seeks, in support, to invoke a wholly inapposite line of reasoning and cases. Proceeding from the incorrect premise that the activity here in question is statutorily protected, the Board, in substance asserted below, as the Solicitor General did recently on its behalf in this Court, that in such cases—

> "[W]hat is required is the balancing of two opposing rights, and it is only when the employer's business need to replace the employees is such as clearly to outweigh the employees' right to engage in protected activity that an invasion of the statutory right is justified."[8]

---

[7] So mesmerized did counsel become by their own repetition—the twenty-three page brief is studded with some eighteen such references—that their summation rested upon the fanciful "refusals" of the two employees here involved "to cross a Safeway . . . picket line" as the Board's reason for concluding they had engaged in "protected activity within the meaning of Section 7 of the Act." Brief for the Board, filed with the court below, p. 23.

[8] Citing *Overnite Transportation Company*, 154 NLRB 1271, 1274 (the hub of the Board's argument on this score) and further citing: *Redwing Carriers, Inc.*, 137 NLRB 1545, 1547, enforced *sub nom. Teamsters Local 79 v. National Labor Relations Board*, 325 F.2d 1011 (C.A. D.C.), *certiorari denied*, 377 U.S. 905; and *Overnite Transportation Company*, 154 NLRB 1271, 1274, enforced *sub nom. Truck Drivers and Helpers Local No. 728* v. *National Labor Relations Board*, 364 F.2d 682 (C.A. D.C.). *Alamo Express, Inc., and Alamo Cartage Company* v. *National Labor Relations Board* (No. 896, petition for certiorari, October Term 1970), Brief for the National Labor Relations Board In Opposition, pp. 5-6.

There can be no quarrel with this long settled principle or with the Board's role as its arbiter (*National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236); as we have suggested, however, it simply has no applicability to the case at bar. In the event the Board again takes the same tack in response to the instant petition, we submit that such a response is wide of the mark.

Similarly, while we think the court of appeals erred in overruling petitioner's contention that it is a separate and not a common employer insofar as Safeway is concerned (notwithstanding that the Board did not so hold), our plea here does not rise or fall with the resolution of that or related factors. In this regard, it is unnecessary to burden the Court with a consideration of the socalled "stranger" picket line at a plant and the relationship between a struck employer and a socalled "neutral" employer, for example, because again our position places no reliance on these concepts or the cases in which they figure.[9] Suffice it to say that the Board's decision contains no finding or hint, nor could it have, that the assignments to which the employees objected was "struck work".[10]

The vice of the decision below is that while condemning partial work stoppages out-of-hand, an aspect touched upon by this Court in *National Labor Relations Board* v. *Rockaway News Supply Co., Inc.*, 345

---

[9] E.g.: *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545 (1962), *enf'd sub nom. Teamsters Local 79* v. *N.L.R.B.*, 325 F.2d 1011 (C.A. D.C. 1963), *cert. den.* 377 U.S. 905.

[10] The decision characterizes petitioner as a "sister corporation of the struck company" and the assignments refused as "work which in all probability normally would have been performed by the struck company" (J.A. 138). Cf., *Truck Drivers Local 433, Teamsters* v. *National Lobar Relations Board*, 334 F.2d 539 (C.A. D.C. 1964).

U.S. 71 (1953), the majority equated the instant case quite literally with a decision of the court of appeals for the Fifth Circuit, as well as an earlier one of its own, "where employees who refused to cross the picket line were accorded § 7 protection" (App. A, p. 6).[11] This was the patently erroneous basis on which the court of appeals proceeded to enforce, without comment, the Board's far flung cease and desist order as well as the requirement for reinstatement of the employees as "economic strikers" who had not, in the Board's view, been replaced.

Finally, we believe that this is a classic case where, as this Court has stated, "the Board's resolution of the issues have amounted not to a resolution of interests which the Act had left to it for case-by-case adjudication, but to movement into a new area of regulations which Congress had not committed to it." *National Labor Relations Board* v. *Insurance Agents International, supra,* 361 U.S. at 499. The recognized expertise of the Board to which the courts defer (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488), is now born of more than thirty five years of experience. If the Board wishes to expand its regulatory frontiers by altering a fundamental concept in its specialized field, it should be required minimally to articulate as well as explain and defend the transition; this has not yet been done. "Where", as this Court has said, "Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked". *National Labor Relations Board* v. *Insurance Agents International, supra,*

---

[11] *National Labor Relations Board* v. *Union Carbide, supra; National Labor Relations Board* v. *Southern Greyhound Lines,* 426 F.2d 1299 (C.A. 5, 1970).

361 U.S. at 499. We submit that, in the far reaching circumstances presented here, the question has indeed not been asked by the Act's framers and that the corrective functions of this Court should therefore be brought to bear.

2. The majority decision below, in the terms in which the issues were framed for decision, is admittedly in conflict with *National Labor Relations Board* v. *Illinois Bell Telephone,* 189 F. 2d 124 (C.A. 7), *cert. den.,* 342 U.S. 885 (1951), and is in further conflict with *National Labor Relations Board* v. *L. G. Everist, Inc.,* 334 F. 2d 312 (C.A. 8, 1964), wherein the court of appeals held that the discharge of employees for refusing to cross the picket line at the premises of another employer, in the absence of anti-union animus, was proper and that the company was not required to reinstate them following the strike, even though they had not been permanently replaced.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WARREN WOODS
LEONARD APPEL
BETTY SOUTHARD MURPHY
Attorneys for Petitioner

Of Counsel:

WILSON, WOODS & VILLALON

August 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,841

VIRGINIA STAGE LINES, INC., *Petitioner,*

–versus–

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition to Review and Set Aside and on Cross-Petition to Enforce an Order of the National Labor Relations Board.

(Argued February 1, 1971 Decided April 15, 1971)

Before BRYAN, CRAVEN, and BUTZNER, Circuit Judges

Betty Southard Murphy (Warren Woods on brief) for petitioner; Eugene B. Granof, Attorney, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Michael F. Messitte, Attorney, on brief) for respondent.

BUTZNER, Circuit Judge:

This petition for review filed by Virginia Stage Lines, Inc., and a cross-petition for enforcement filed by the National Labor Relations Board arise out of the discharge of two of the company's bus drivers who refused to perform work that might otherwise have been undertaken by drivers striking a commonly owned corporation. We enforce a Board order reinstating the men with back pay.[1]

Virginia Stage Lines, Inc., and Safeway Trails, Inc., are wholly owned subsidiaries of Continental Trailways, Inc.,

---

[1] Virginia Stage Lines, Inc., 182 NLRB No. 107, 74 LRRM 1300 (1970).

and both, along with other bus companies, operate regularly scheduled and charter buses out of the Trailways Terminal in Washington, D. C. Virginia Stage operates regularly scheduled trips between Washington and points south. Safeway's scheduled routes run between Washington and points north. Both companies have ICC authority to run charter buses in either direction, but both generally concentrate their charter business in the areas served by their scheduled operations.

The division of the charter business is more or less formalized. The director of sales for the Trailways Terminal supervises the booking of all charters out of Washington for all Continental Trailways companies serving the area. He testified that each January the companies' general managers establish a quota of buses available for charter. As a general rule, the terminal's sales director assigns charters north of Washington to Safeway if that company has equipment available. Charters south of Washington are assigned to Virginia Stage until its quota is filled. When Safeway is unable to provide a bus for a northbound charter, the director calls on Virginia Stage to take the run. Conversely, when Virginia Stage cannot take a southern charter, Safeway ordinarily is offered the job. Only when both companies lack equipment does the director contact a non-affiliated bus line.

Although commonly owned, the companies are separately managed and each has its own labor policies. The drivers for Safeway are represented by the United Transportation Union, AFL-CIO. Virginia Stage drivers in the Washington area, despite frequent organizational efforts, are not unionized. The record, however, discloses no anti-union bias on the part of the company, and its drivers stationed in the western part of Virginia are organized.

In April 1969, Safeway's union drivers began an economic strike which lasted five months causing Safeway to cancel its scheduled runs and sharply curtail its charter

operations. Instead of having 30 buses a day available for charter, the number varied from 7 to 12. Although Virginia Stage did not assume any of Safeway's scheduled runs, its northbound charter business appreciably increased during the strike. Safeway's strikers set up picket lines which the Virginia Stage drivers had to cross to get in and out of the Washington terminal and the garage both companies used. Although Virginia Stage's scheduled runs and southern charters continued uninterrupted, some resistance developed to performing the northern charter work which the Safeway strikers regarded as belonging to Safeway.

Two Virginia Stage drivers, Charles Tallent and Richard Loughhead, were supporters of the union. A year before the strike they had made their apartment available for meetings to discuss affiliation with the union, and during the strike, they solicited their fellow employees for a representation election. These activities were not known to the company.[2]

Tallent and Loughhead, who were assigned to the company's extra board, served in rotation with other drivers for charters and as substitutes for scheduled runs. Both willingly drove scheduled runs and southbound charters even though they were required to cross the Safeway drivers' picket lines. They took occasional charter trips north, but as the strike wore on, both, pleading fear of reprisal by the Safeway strikers, refused to accept northbound charters. Tallent also explained that his refusal to take the northern trips was based in part on his belief that he would be doing work that properly belonged to the Safeway strikers. Both drivers expressed a wish to continue driving to the south. After officials of the company un-

[2] The trial examiner, with the subsequent approval of the Board, dismissed a charge that the company discriminated against Loughhead and Tallent because they were active in organizing company drivers. No review is sought on this issue.

successfully sought to persuade them to change their views, they were discharged. At least two other drivers protested the northbound charters, but upon threat of discharge they agreed to take the assignments.

Several days after Loughhead's discharge, he notified his supervisor that if other drivers continued to drive north, he would also go. The company, however, refused to reinstate him. Tallent did not apply for reinstatement.

The Board, finding that Tallent and Loughhead refused to drive northbound charters as a direct result of the strikers' picketing activities, held that the two men were engaged in activity protected under § 7 of the Labor Act [29 U.S.C. § 157] by making common cause with the strikers for mutual aid and protection. The Board also found that the company did not hire permanent replacements for either employee. From this, it concluded that the drivers were not discharged on account of the company's need to carry on its business, but because they had engaged in protected concerted activity. Absent clear business necessity, the outright discharge of employees protected under § 7 is, in the Board's view, a violation of § 8(a)(1) [29 U.S.C. § 158(a)(1)], and it ordered the company to reinstate Loughhead with back pay as of the date he offered to return to work and Tallent with back pay as of the end of the Safeway strike.

The company attacks the Board's order on two grounds: first, that Tallent and Loughhead did not engage in protected, concerted activity immunizing them from discharge when they refused to take the northbound trips; and second, that the Board incorrectly determined that Loughhead's offer to return to work was unqualified and that Tallent was not required to apply for reinstatement. In any event, the company says, the men had been permanently replaced.

Section 7 of the Act [29 U.S.C. § 157] guarantees the right of every employee "to form, join or assist labor or-

ganizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." In NLRB v. Union Carbide Corporation, — F.2d — (4th Cir. 1971), we held that § 7 protected an employee who refused as a matter of principle to cross a picket line maintained by fellow employees at his employer's place of business even though the striking union was not his bargaining representative.[3] We agreed with the Fifth Circuit that such an employee "has in effect plighted his troth with the strikers, joined in their common cause and thus has become a striker himself." NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1301 (5th Cir. 1970); accord, NLRB v. Difco Laboratories, Inc., 427 F.2d 170 (6th Cir. 1970); contra, NLRB v. Illinois Bell Telephone, 189 F.2d 124 (7th Cir.), *cert. denied,* 342 U.S. 885 (1951).

Notwithstanding Virginia Stage's contention that it is a separate employer,[4] the Board was fully justified in ap-

---

[3] Tallent explained that support for the union was one of his reasons for refusing to take the charter trips. Loughhead simply said he was afraid, but his advocacy of the union distinguishes his situation from that of Mullins, the employee who was denied protection in *Union Carbide.* Mullins' refusal to cross the picket line was based "on fear and nothing else." — F.2d at —.

[4] The kinship of Virginia Stage and Safeway distinguishes this case from NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953), and NLRB v. L. G. Everist, Inc., 334 F.2d 312 (8th Cir. 1964), which did not involve a common employer. Other cases indicate that employees of a neutral employer are protected when they refuse to cross a stranger picket line. See NLRB v. Alamo Express, Inc., 430 F.2d 1032 (5th Cir. 1970); Overnite Transp. Co., 154 NLRB 1271, 60 LRRM 1134 (1965), *enf'd sub nom.,* Truck Drivers and Helpers Local No. 778 v. NLRB, 364 F.2d 682 (D.C. Cir. 1966). See also NLRB v. L. G. Everist, Inc., *supra,* 334 F.2d at 318 (Judge Matthes dissenting). We express no opinion on this issue. We do note, however, that *Rockaway News* probably was decided on the narrow ground that a no-strike clause had been breached by the discharged employee. See NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1302 (5th Cir. 1970).

plying the law applicable to a common employer. Both companies are commonly owned, operate from a common Washington terminal, and most important—from the standpoint of this case—have well integrated charter businesses. As a comparison of Virginia Stage's charter operations before and after the strike illustrates, the parent company was able to salvage part of Safeway's losses with Virginia Stage's gains and to this extent blunt the impact of the Safeway strike. From May 1, 1968 to June 20, 1968, a year before the strike, Virginia Stage made 21 charter trips north. For a corresponding period during the strike, Virginia Stage's northern charter business increased six-fold, to 130 trips. In our judgment, the Board properly held that Virginia Stage cannot accept benefits of common ownership which enhance its profits from charter operations, and at the same time, claim independence from Safeway with respect to labor controversies involving those same charters.

Virginia Stage asserts that the Board's emphasis on the common characteristics of the companies is contrary to its holding in Transcontinental Bus System, Inc., 178 NLRB 110, 72 LRRM 1214 (1969). That case, however, involved only the determination that the separate corporations of the Transcontinental family were more appropriately suited for separate bargaining units than for a single nationwide unit, and it in no way settled the relationship of commonly owned bus companies for all purposes. Furthermore, it should be noted that identity of bargaining units is of little significance in the context in which Loughhead and Tallent assert their § 7 rights. This is illustrated by both NLRB v. Union Carbide, — F.2d — (4th Cir. 1971), and NLRB v. Southern Greyhound Lines, 426 F.2d 1299 (5th Cir. 1970), where employees who refused to cross the picket line were accorded § 7 protection although they were not members of the bargaining unit whose union was on strike.

The company, drawing an analogy to the partial strikes held unprotected in Home Beneficial Life Ins. Co. v. NLRB,

159 F.2d 280 (4th Cir.), *cert. denied,* 332 U.S. 758 (1947), and NLRB v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946), contends that Loughhead and Tallent could not refuse to perform some, but not all, of their work.[5] We do not hold, however, that they could engage in a slowdown, or in any way decline to perform all their assigned work and yet remain on the job entitled to their pay. We would find it unexceptionable for the company, if need be, to permanently replace them, or to suspend them until the end of the strike unless they earlier abandoned it. Indeed, the Board expressly recognized that if it were reasonably necessary in carrying on the company's business, Virginia Stage was free to replace the two drivers because they are in effect no more than economic strikers. Cf. NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, 345 (1938); Redwing Carriers, Inc., 137 NLRB 1545 (1962), *enf'd sub nom.,* Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 905 (1964). Substantial evidence, however, supports the Board's finding that the company did not permanently replace either Loughhead or Tallent. Therefore, because of the men's status as economic strikers, the Board could require their reinstatement. Cf. NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Union Carbide Corp., — F.2d — (4th Cir. 1971); NLRB v. Southern Greyhound Lines, 426 F.2d 1299 (5th Cir. 1970).

Finally, Virginia Stage argues that neither Loughhead nor Tallent made an unconditional offer to return to work,

---

[5] While the rule against partial strikes is unquestioned, its application to refusals to cross a picket line has been criticized. See Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act,* 115 U. Pa. L. Rev. 1195, 1226 n. 133 (1967). In any event, the company's analogy is particularly vulnerable because Loughhead and Tallent, who worked only when their names reached the top of the extra board, volunteered to relinquish that position, perform no work, and go to the bottom of the Board without pay when they were assigned to a northbound charter.

and for that reason are not entitled to reinstatement with back pay. Loughhead told his supervisor that he would accept northbound charters if the rest of the drivers were going to continue to take them. At the time he made this statement, all the other drivers were performing their charter assignments north. The condition was, therefore, fulfilled, and the company had no right to refuse him reinstatement on that ground.

Tallent also, by virtue of his status as an economic striker, was entitled to reinstatement. Once he assumed this status, Virginia Stage was not privileged to terminate his employment completely except under circumstances not present in this case. See e.g., Redwing Carriers, Inc., 137 NLRB 1545, 50 LRRM 1440 (1962), *enf'd sub nom.*, Teamsters, Chauffeurs & Helpers Local Union No. 179 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964); Overnite Transp. Co., 154 NLRB 1271, 60 LRRM 1134 (1965), *enf'd sub nom.*, Truck Drivers and Helpers Local No. 728 v. NLRB, 364 F.2d 682 (D.C. Cir. 1966). But Tallent was unqualifiedly discharged in violation of his rights. He, therefore, had no reason to notify the company at the end of the strike that he was ready for work, and he could properly view an application for reinstatement as a ritualistic act. Since Virginia Stage never afforded him reinstatement, the Board's order was an appropriate remedy well within its statutory power. NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1303 (5th Cir. 1970).

The petition to review, and set aside the order of the National Labor Relations Board is dismissed, and the order of the Board will be enforced.

Albert V. Bryan, Circuit Judge, dissenting:

The majority now completely repudiates our decision in NLRB v. Union Carbide Corporation, — F.2d — (4 Cir.

1971) by affording Tallent and Loughhead § 7 protection. 28 USC 157. There we said:

> "One who is afraid to cross a picket line by reason of physical fear makes no common cause, contributes nothing to the mutual aid or protection and does not act on principle. Mullins' [the non-striking-union employee] refusal to cross the picket line was not protected activity under Section 7, and enforcement of the Board's order [of reinstatement] as to him will be denied".

This proposition is the determinant of the controversy here. When they refused to perform their jobs, Tallent and Loughhead unequivocally and repeatedly told the company that fear of hurt or harm actuated them. That this was no mere pretense and there was imminent justification for it, witness:

Non-striking Virginia drivers such as Loughhead and Tallent were threatened by Safeway strikers with damage to their personal safety; cars were destroyed; drivers' wives were harassed by threatening telephone calls; when arriving at the terminal to take a New York charter bus usually run by the striking union, four or five pickets "backed me [Tallent] up against the bus and told me not to go" and if I did, they would "personally tear my car up", which was then at the terminal garage, and that they would call New York and "make sure I would not return".

Yet these are the persons with whom the Board finds Loughhead and Tallent "plighted their troth, joined in their common cause" and thus became strikers themselves. I cannot imagine substantial evidence casting these two in this character. For me it is utterly unbelievable that they were in truth loyal and devoted confederates, sympathizing with those who were threatening their lives. Nevertheless, it is on this remarkable finding that the Board and the Court give Tallent and Loughhead § 7 protection.

Motivation of the refusals to work must be appraised as of the time they occurred, not in the later cooling days, weeks or months. When it happened Tallent and Loughhead pleaded fear and they ought to know. Their refusals were not hasty determinations. They had studiedly resisted the company's attempts to persuade them to remain as employees. Surely the employer is not to be found in fault because it accepted the persistent word of the dischargees. The endeavor now to avoid *Union Carbide* by playing down the positiveness of their declaration by calling it an "excuse" or no more than momentary timidity, just will not pass muster under the substantial evidence analysis. The recited facts wholly douse it.

Since Loughhead and Tallent were discharged for cause, thereafter they had no mandatory claim on the company for restoration. See *Union Carbide*, supra. Hence, the Board's reinstatement order wilts on analysis.

I would reject the order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,841

VIRGINIA STAGE LINES, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

THIS CAUSE came on to be heard upon the petition of Virginia Stage Lines, Inc., for review of an order issued against it by the National Labor Relations Board on May 26, 1970, in proceedings before the said Board known upon its records as Case No. 5-CA-4413; upon cross-application for enforcement, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said petition of Virginia Stage Lines, Inc., be, and it is hereby, dismissed; and that the said order of the National Labor Relations Board be, and it is hereby enforced; and that Virginia Stage Lines, Inc., abide by and perform the directions of the Board in said order contained.

(Seal)

SAMUEL W. PHILLIPS
Clerk

A True Copy, Teste:
SAMUEL W. PHILLIPS, *Clerk*

By WILMA UPSHUR
Deputy Clerk

Filed May 10, 1971
Samuel W. Phillips
Clerk

Filed May 5, 1971
Samuel W. Phillips
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,841

VIRGINIA STAGE LINES, INC., *Petitioner,*

—versus—

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Order Denying Petition for Rehearing

Upon consideration of the petition for rehearing and of the suggestion for a rehearing en banc;

Now, therefore, with the concurrence and approval of the other members of the panel and in the absence of a request for a poll of the entire court, as provided by Appellate Rule 35(b),

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Judge Bryan dissents from the denial of rehearing.

/s/ JOHN D. BUTZNER, JR.
United States Circuit Judge

A True Copy, Teste:

SAMUEL W. PHILLIPS, *Clerk*

By VIRGINIA LYSFORD
Deputy Clerk (Seal)

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case 5-CA-4413

VIRGINIA STAGE LINES, INC.

and

LOCAL 1023, UNITED TRANSPORTATION UNION, AFL-CIO

Maurice J. Nelligan, Jr., Esq.,
for the General Counsel.

Warren Woods, Esq., and *Betty Southard Murphy, Esq.* (*McInnis, Wilson, Munson & Woods*), of Washington, D. C., for the Respondent.

Herman Sternstein, Esq. (*Zimring, Gromfine & Sternstein*), of
Washington, D. C., for the Charging Party.

Before: *Frederick U. Reel*, Trial Examiner.

Trial Examiner's Decision

STATEMENT OF THE CASE

This case, heard at Washington, D. C., on September 23, 1969,[1] pursuant to a charge filed the preceding June 16 and a complaint issued August 8, presents primarily the question whether the protection of Section 7 extends to two busdrivers who refused to operate certain assigned charter runs because pickets engaged in an economic strike against another employer represented that but for the strike the runs would have been awarded to their employer.

[1] All dates herein refer to the year 1969 except where otherwise indicated.

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent, I make the following:

Findings of Fact

I. The Business of the Company and the Labor Organization Involved

Respondent, herein called the Company, a Virginia corporation engaged in several States in the operation of an interstate bus line, has annual gross revenue in excess of $250,000, and is admittedly an employer engaged in commerce within the meaning of Section 2(6) of the Act. The Charging Party, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. *Background—The Relationship Between the Company and Safeway Trails, Inc., and the Strike Against Safeway.*

For a number of years prior to the events in this case the Company has been a subsidiary of Continental Trailways, Inc., serving primarily the areas south and west of Washington, D. C., into Virginia and West Virginia. Another subsidiary of Continental Trailways, Inc., known as Safeway Trails, Inc. (herein called Safeway), also operates out of Washington, primarily serving the areas north and east, including Pennsylvania and New York. In addition to their regularly scheduled runs, both the Company and Safeway operated chartered trips out of Washington. In general, chartered trips to the north were operated by Safeway, and those to the south by the Company. In peak periods, however, when Safeway did not have sufficient equipment or manpower to operate a charter to the north, it might be assigned to the Company, and under reverse conditions a charter to the south might be handled by

Safeway. Both the Company and Safeway operate out of the Trailways terminal at 12th Street and New York Avenue in Washington.

For administrative purposes the Company is divided into an eastern and western division. The drivers employed in the latter are represented by a labor organization, but those in the eastern division, which includes Washington, are not. At the time of the events here in question the Union was attempting to organize the eastern division drivers. The Union represented the Safeway drivers, and at the time in question was conducting a strike against Safeway following the expiration of their collective-bargaining agreement.

The strike commenced April 1, 1969, and continued for approximately 5 months. The Union picketed the Trailways terminal in Washington and the garage used by both Safeway and the Company, so that drivers employed by the Company had to cross the picket lines to come to work. During the strike Safeway did not operate its regularly scheduled runs, but it continued to operate charter trips, using nonstriking personnel. The number of charter trips handled by Safeway was drastically curtailed as a result of the strike; instead of having as many as 30 buses per day available for such trips, the number varied from 12 to 7. As a direct result of this, the charter operations of the Company substantially increased, by up to seven buses per day. The balance of the charter business which Safeway had to relinquish went to other carriers. Between May 1 and June 20, 1968, the Company operated only 21 charter trips into territory primarily serviced by Safeway, but for the same dates in 1969 (during the strike) the number of such trips increased to 130.

B. *Loughhead and Tallent Refuse To Drive Charters North of Washington and Are Discharged*

Early in April driver Charles Tallent, an employee of the Company on its "extra board,"[2] advised the Company that he would not drive a particular charter trip to New York City. He explained to the Company that on returning from a previous trip to New York he had been threatened by several pickets, and he was afraid to go again. On the witness stand Tallent referred to this as an "excuse," stating: "I couldn't just come out and tell them that I was sympathizing with the Union at that time." Apparently in discussing the matter at the time with company officials, Tallent said he was nervous and that his stomach was upset. The Company excused him from the New York run that day on the ground that he was sick, although he finished driving a local charter that day after his conversation with management. Thereafter, however, Tallent operated charter trips to the north until his refusal to do so on June 10, described below.

On Sunday, June 1, driver Richard Loughhead, like Tallent an employee of the Company on the extra-board, and, also like Tallent, an active organizer for the Union among the extra-board drivers, was called to the terminal to drive an empty bus to New York and bring back a chartered trip. While Loughhead was at the terminal, a group of pickets "backed [him] up against the bus and told [him] not to go, that [he] was being used as a strike breaker." They also threatened that if he went, they would "tear [his] car up . . . and they would call to New York and make sure [he] would not return."

---

[2] The "extra board" is made up of drivers with insufficient company seniority to qualify them for regularly scheduled runs. These drivers operate a special section of regular runs, substitute for regular drivers who are unavailable, and drive charter trips. Men on the "extra board" are assigned in rotation, going to the "bottom of the board" when they finish a trip. They are not ordinarily permitted to refuse an assignment.

Loughhead thereupon told the dispatcher, and later repeated to higher officials of the Company, that because of threats he would not drive the bus. Finally, General Manager Harmon told Loughhead to think the matter over for the rest of the day,[3] and to telephone by midnight if he was prepared to go to work and take assignments as they came. Loughhead did not telephone, and Harmon regarded Loughhead's employment as terminated. The following Thursday, June 5, Loughhead notified Supervisor Ramsey that if the other drivers were going to continue to drive north, he (Loughhead) would go also. Ramsey referred him to Harmon, and Loughhead, on Saturday, June 7, made the same representation to Harmon. Harmon, however, told Loughhead that he was terminated and could not go back to work. At that time no replacement for Loughhead had been hired.

On Sunday, June 8, Tallent and several other extra-board drivers agreed among themselves that they would not handle any more northbound charter trips. Later that day driver Ritenour and Hill both refused to take such charters. In each case a company official informed the driver the next day that the driver would be permanently removed from the extra-board unless he agreed to take any and all assignments that came to him, and in each case the driver promptly agreed to do so and was returned to work.

On June 10 Tallent declined to take a charter trip to Douglassville, Pennsylvania, a small town northwest of Philadelphia, explaining to Assistant General Manager Rees that he (Tallent) had been threatened by the pickets, and also that he regarded the trip as "Safeway work." In the course of the discussion Rees asked Tallent how the "little meetings were doing." Tallent replied that he did not understand and Rees continued: "You didn't

[3] The Company paid a bus company in New York to handle the trip.

have any meetings?" Tallent replied that any time two people spoke together "it might be called a meeting."[4] Rees, pointing out that Tallent had refused a charter trip the preceding April, insisted that Tallent either agree on the spot to take whatever runs he was assigned, or he would be considered as "resigning." Tallent replied that he considered himself "fired," and left. The charter trip was then cancelled.

Rees in general confirmed Tallent's testimony. As to the inquiry about "meetings," Rees testified as follows:

> On the Monday morning when I first got to work, in the case of Ritenour and Hill, when they refused the assignment, I noticed there were quite a few drivers around the terminal and all of them were interested in what was going on.
>
> Just as a shot in the dark, not knowing anything about any meeting or whether or not one had been held, I asked him how many people had been at the meeting and, of course, I got the reaction that Mr. Tallent told you about, and his testimony was very accurate in that respect, and I dropped the subject.
>
> I had no knowledge that even a meeting had been held, and I did think there was some agreement between the men that they were going to get together and turn down the work.

The record does not establish that the Company ever permanently replaced either Loughhead or Tallent. The Company showed that it had two trainees who on June 13 qualified for the extra board, but they would have been placed there whether or not Loughhead or Tallent or any other drivers had been discharged. The Company also, later in June, employed some school teachers as temporary employees on the extra board, but this was pursuant to

---

[4] Union organizing meetings involving Tallent had been held in March 1968 and in the fall of 1968. Organizing efforts were being vigorously pursued in April and May 1969.

a prior arrangement, and they were in no sense permanent replacements for Loughhead and Tallent.[5] There is some evidence that the Company might have transferred men from Washington to Richmond but for the discharge of Loughhead and Tallent. The testimony in this regard is somewhat vague, as Assistant General Manager Rees referred to a "reduction of service in Richmond" which resulted in "no need to transfer these men to Richmond who were needed in Washington," although he also referred to an inability to "spare the additional men . . . from Washington . . . ." Rees also testified that at the time of the Loughhead-Tallent incidents, the Company had from 30 to 32 drivers on the extra board, that at the end of June it had from 38 to 40, and that "it is not likely" the Company would have had that many if it had retained Loughhead and Tallent. Presumably Rees intended to testify that it is "likely" the 38 to 40 would have included Tallent and Loughhead, had they not been discharged. As the extra board would have been augmented by the two trainees in any event, this is tantamount to a prediction that the Company would have hired only four school teachers as temporary employees rather than six. Apart from the speculation and the indefiniteness of Rees's testimony, it is clear that none of the men employed on the extra board were hired as permanent replacements for Loughhead and Tallent.

C. *Concluding Findings*

Insofar as General Counsel contends that the Company discriminated against Loughhead and Tallent because they were active in organizing company employees on behalf of the Union, I am constrained to dismiss the allegation as unsubstantiated by the evidence. There is no showing that the Company was aware of their activity in this regard, and little, if any, evidence that the Company's approach to them was harsher than to other drivers who

[5] The Company in its brief states that it "employed the usual school teachers as extra board employees for the summer months."

originally refused to take charter trips to the north. The allegation in the complaint that the Company "interrogated [its] employees at [its] offices concerning their activities on behalf of the Union" must also be dismissed. The sole evidence in support thereof is Rees' inquiry of Tallent as to the employees' meetings, and this isolated casual inquiry is insufficient basis for a finding of unlawful interrogation.

As to the major issue, however, I agree with General Counsel that Loughhead and Tallent were discharged for engaging in a statutorily protected concerted activity, and for assisting a labor organization. Both men were discharged for their refusals to drive northbound charters, and in both cases their refusals were the direct result of picketing activities by the Union in support of the strike against Safeway. In essence, therefore, their refusals demonstrated that they were making common cause with the Safeway strikers, that they were thereby engaging with those strikers in concerted activity for mutual aid or protection, and that they were assisting the striking union. Indeed, Tallent expressly told the Company that he regarded the trip as "Safeway work," and Rees was aware that Tallent and other drivers "were going to get together and turn down the work." Loughhead, to be sure, expressed the ground for his refusal as fear of reprisal at the hands of the pickets. Parenthetically, one may wonder whether Loughhead, a strong supporter of the Union, was altogether candid with the Company, or whether he, like Tallent the preceding April, was using his "fear" as an "excuse" as he hesitated to reveal his union sympathies. But even assuming Loughhead was motivated by fear of reprisal, his subjective reason for joining in the concerted activity does not render it any the less concerted. It may well be true in strike situations that some of the strikers participate out of fear of reprisal rather than out of a real commitment to the strike and its objectives, but it has never been held that inquiry into such motives is appropriate or that statu-

tory protection is lost if the employee's participation was dragooned rather than freely offered.

The Board has repeatedly held that employees who respect a picket line of striking employees are thereby engaging in a protected concerted activity. Such holdings apply *a fortiori* to the instant case where the employing company is a sister corporation of the struck company (both wholly owned subsidiaries of the same parent) and where the work which the employee refuses is work which in all probability normally would have been performed by the struck company. For recent holdings see *Lenkurt Electric Co., Inc.*, 177 NLRB No. 87, and the cases there collected by Trial Examiner Corenman; *Smith Transit, Inc.*, 176 NLRB No. 141, and the cases there discussed by Trial Examiner Scharnikow; *Nuodex Division of Tenneco Chemicals, Inc.*, 176 NLRB No. 79, and the cases there cited by Trial Examiner Asher. Insofar as the Eighth Circuit indicated to the contrary in *N.L.R.B.* v. *L. G. Everist, Inc.*, 334 F.2d 312, it is sufficient to note that the case is distinguishable, that the Board's holdings are binding upon me, and that the dissent by Judge Matthes in my opinion correctly states the law.

The action of the employees in this case in refusing to drive northbound charters was equivalent to their respecting the picket lines and hence enjoyed statutory protection. The Company was, of course, free to replace them or indeed to discharge them if such action was reasonably necessary to carry on the Company's business. I find, however, that the Company acted in reprisal for the employees' concerted action rather than to carry on its business. The record is clear that no one had been hired in Loughhead's place at the time he expressed his readiness to drive northbound charter trips if the other drivers were doing so. Tallent was likewise not replaced by a permanent employee, so that it cannot be said that his severance was necessary to permit the Company to operate. At most the Company showed that it needed to rely on its extra-board men in rotation, but this would

justify dropping Tallent for the duration of the strike, not discharging him.[6] I therefore find that by discharging Loughhead and Tallent for their refusal to operate northbound charters, the Company violated Section 8(a)(1) of the Act.[7]

Conclusion of Law

Respondent by discharging Loughhead and Tallent for engaging in a protected concerted activity and for assisting a labor organization committed an unfair labor practice affecting commerce within the meaning of Section 2(6) and Section 8(a)(1) of the Act.

The Remedy

I shall recommend an order directing the Company to cease and desist from its unfair labor practices, to offer Loughhead and Tallent reinstatement with backpay, and to post an appropriate notice. Backpay for Loughhead should commence on Thursday, June 5, the date he offered to resume driving northbound charters. This offer was conditioned upon other drivers also undertaking such trips, but the Company was aware that this condition was being met. After his discharge Tallent never gave any indication of willingness to drive northbound charters, and therefore backpay for him should commence with the termination of the strike. As he had been discharged, he was not required to apply for reinstatement after the strike, and Loughhead's experience shows that such application on Tallent's part would have been futile. See the *Lenkurt* and *Nuodex* cases, *supra;* see also *N.L.R.B.* v. *Comfort, Inc.,* 365 F.2d 867, 877-878 (C.A. 8), and cases there cited. Backpay should be computed in accordance

[6] Furthermore, the charter trips which Loughhead and Tallent were refusing were in a real sense not part of the Company's normal business, but part of an increase in that business brought about by the strike at its sister company.

[7] Respondent emphasizes its statutory duty to operate these charters. I would suppose that Safeway had even a greater "duty" to operate its regularly scheduled runs, but this would not warrant discharge of employees for going on strike.

with the formulas set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Accordingly, upon the foregoing findings and conclusions and upon the entire record, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

Respondent Virginia Stage Lines, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee because he was engaged in concerted activities for mutual aid or protection and has assisted a labor organization by refusing during the course of a strike to perform work which the strikers contend would normally be performed by them.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to reinstate Richard Loughhead and Charles Tallent to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner described in the portion of the Trial Examiner's Decision entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against them.

(b) Notify Richard Loughhead and Charles Tallent if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all pay-

roll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Decision.

(d) Post at the Washington, D.C., Trailways Terminal, and at the garage in Washington, D.C., where the Company's busses are kept, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by an authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.[8]

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[9]

Dated at Washington, D.C.

---

[8] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[9] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 5, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

TXD—625—69

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL offer Richard Loughhead and Charles Tallent their former jobs, and will pay them for losses they suffered as a result of our having discharged them in June 1969. If either of them should currently be serving in the Armed Forces of the United States, WE WILL notify him of his right to full reinstatement after discharge from the Armed Forces, upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended.

WE WILL NOT discharge, or threaten to discharge, or otherwise discriminate against, any employee for refusing, during the course of a lawful strike, to perform work which the strikers contend would normally be performed by them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their right to engage in concerted activity for mutual aid or protection, or to assist a labor organization.

VIRGINIA STAGE LINES, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 1019, Charles Center, Baltimore, Maryland 21202, Telephone 301—962—2822.

182 NLRB No. 107 D-3956
Washington, D. C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 5-CA-4413

VIRGINIA STAGE LINES, INC.

and

LOCAL 1023, UNITED TRANSPORTATION UNION, AFL-CIO

Decision and Order

On November 17, 1969, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that Respondent had not engaged in certain other unfair labor practices and recommended that such allegations be dismissed. Thereafter, the Respondent filed exceptions and the General Counsel filed cross-exceptions to the Trial Examiner's Decision, and both filed supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as modified below.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that th Respondent, Virginia Stage Lines, Inc., Washington, D. C., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified.

1. Substitute for paragraph 2(a) of the Trial Examiner's Recommended Order the following:

Offer to Richard Loughhead and Charles Tallent immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make the whole in the manner described in the portion of the Trial Examiner's Decision entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against them.

2. Substitute for the first indented paragraph of the "Notice to all Employees" the following:

> WE WILL OFFER to Richard Loughhead and Charles Tallent immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner described in the portion of the Trial Examiner's Decision entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against them. If either of them should currently be serving in the Armed Forces of the United States, we will notify him of his right to such reinstatement after discharge from the Armed Forces, upon application, in accordance with the Selective Service Act

and the Universal Military Training and Service Act, as amended.

Dated, Washington, D. C.

May 26, 1970

FRANK W. MCCULLOCH,
Chairman

JOHN H. FANNING,
Member

GERALD A. BROWN,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Supreme Court, U.S.
FILED
SEP 8 1971
E. ROBERT SEAVER, CLERK

No. 71-164

In the Supreme Court of the United States

OCTOBER TERM, 1971

VIRGINIA STAGE LINES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

PETER G. NASH,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

National Labor Relations Board,
Washington, D. C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-164

VIRGINIA STAGE LINES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 441 F. 2d 499 (C.A. 4). The decision and order of the National Labor Relations Board (Pet. App. 26a-28a) are reported at 182 NLRB No. 107. The decision of the trial examiner is printed in Pet. App. 13a-25a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) was entered on May 10, 1971. The petition for a writ of certiorari was filed on August 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner violated Section 8(a)(1) of the National Labor Relations Act by discharging two drivers who refused to cross a picket line to perform work that would otherwise have been performed by employees striking another, commonly owned company.[1]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at page 3 of the petition.

STATEMENT

A. The Board's Findings of Fact

Petitioner, Virginia Stage Lines, Inc. (Virginia), and Safeway Trails, Inc. (Safeway), are wholly owned subsidiaries of Continental Trailways, Inc. Both Virginia and Safeway operate regularly scheduled and charter buses out of the Trailways Termi-

---

[1] A similar issue is presented in *Union Carbide Corp.* v. *National Labor Relations Board*, No. 70-200.

nal in Washington, D. C. Virginia's regularly scheduled routes are between Washington and points south; Safeway's run between Washington and points north. Both companies have Interstate Commerce Commission authority to run charter buses to and from Washington in either direction, but both generally concentrate their charter business in the areas covered by their scheduled operations. (Pet. App. 14a-15a; A. 11-12.)[2]

The terminal's sales director, who directs charters for all Continental Trailways companies serving the area, generally assigns charters north of Washington to Safeway if that company has equipment available. Charters south of Washington are assigned to Virginia until its quota is filled. When Safeway is unable to provide a bus for a northbound charter, the director calls on Virginia to take the run. Conversely, when Virginia cannot take a southbound charter, Safeway ordinarily is offered the job. Only when both companies lack equipment does the director offer the charter to a non-affiliated bus line. (Pet. App. 14a-15a; A. 104-106.)

Safeway drivers were represented by the United Transportation Union, AFL-CIO (the Union). The eastern division of petitioner Virginia was not organized (Pet. App. 15a).

In April 1969, Safeway's drivers went on strike against Safeway in a dispute over new contract terms. During the strike, which lasted five months,

---

[2] "A." refers to the Joint Appendix to the briefs in the court of appeals.

the strikers picketed the Trailways Terminal in Washington and the garage used by both Safeway and Virginia, so that the Virginia drivers, who were not represented by a union, had to cross the picket lines to come to work. (Pet. App. 15a; A. 9-10.) The strike caused Safeway to cancel its scheduled runs and to curtail its charter operations from 30 buses a day to 7 or 12 (Pet. App. 15a; A. 106-108). While Virginia did not assume any of Safeway's scheduled runs, its northbound charter business increased by up to 7 buses per day as a direct result of the strike. Thus, whereas between May 1 and June 20, 1968, Virginia had operated only 21 charter trips into territory primarily serviced by Safeway, during the same period in 1969 the number of such trips increased to 130. (Pet. App. 15a; A. 54-56, 103-104, 113-117.)

Charles Tallent and Richard Loughhead were employees of petitioner Virginia, assigned to its "extra board"—they rotated with other "extra board" drivers to drive charters and special sections on scheduled runs and to substitute for unavailable regular drivers (Pet. App. 16a, n. 2; A. 19, 34, 85-86). Tallent and Loughhead had been supporters of the Union's efforts to organize the eastern division of Virginia.[3] During the strike both willingly drove scheduled runs and southbound charters even though this required

---

[3] A year before the strike they had made their apartment available for meetings to discuss affiliation with the Union, and, during the strike, they solicited their fellow employees for a representation election (Pet. 18a, n. 4; A. 21-22, 30-31, 36-37).

their crossing the Safeway drivers' picket lines. In the beginning of the strike they took occasional charter trips north, but, as the strike wore on, both men, reciting threats by Safeway strikers, refused to accept northbound charters. At the time of his refusal to take a northbound charter, Tallent told the company he regarded the trip as "Safeway work." Although both drivers said they wished to continue driving to the south, they were discharged. (Pet. App. 16a-18a; A. 23-24, 41-43, 62-63, 69, 80, 93, 97-98.)

Several days after Loughhead's discharge, he notified his supervisor that, if other drivers continued to drive north, he would also go. Virginia, however, refused to reinstate him. Tallent did not apply for reinstatement. (Pet. App. 17a; A. 25.) No employees were hired as permanent replacements for Loughhead or Tallent (Pet. App. 18a-19a; A. 69, 87, 81, 93-94).

B. The Decisions Below

The Board found that Loughhead and Tallent refused to drive northbound charters as a "direct result of picketing activities by the Union in support of the strike against Safeway," that this was concerted activity protected by Section 7 of the Act, and that Virginia, in discharging them for this activity, "acted in reprisal for the employees' concerted action rather than to carry on its business," and thus violated Section 8(a)(1) of the Act (Pet. App. 20a-22a). The Board ordered Virginia, *inter alia*, to offer Loughhead and Tallent full reinstatement and to

make them whole for lost earnings (Pet. App. 22a-25a, 27a-28a). The court of appeals (one judge dissenting) sustained the Board's findings and conclusions, and enforced its order.

ARGUMENT

Petitioner's basic contention is that, since employees Loughhead and Tallent were willing to cross the picket lines to perform other work, their refusal to cross the lines to perform the northern charter work was an unprotected partial strike (Pet. 18-19). It is true that certain kinds of employee conduct, falling short of an unqualified refusal to work, have been denied the protection of Section 7 of the Act because they are calculated randomly to disrupt the employers' production and planning, and thus to inflict undue economic hardship upon him. See, *e.g.*, *Auto. Workers* v. *Wisconsin Board*, 336 U.S. 245, 249-250, 264, n. 17. But a selective refusal to cross a picket line has none of these consequences. It is not calculated to harm the employer, except to the extent necessary to help other striking employees, and it is predictable, allowing the employer to take any necessary corrective action, including—as the court below observed—replacement of the employees (Pet. App. 7a). In short, the injury to the employer is no greater than—indeed it is less than—the injury caused by an unqualified refusal to cross a picket line at his place of business. Thus, as the court below properly concluded, this case falls within the rationale of decisions holding that Section 7 protects an em-

ployee who refuses altogether to cross a picket line at his employer's place of business.[4]

Indeed, an employee's refusal to cross a picket line at a place of business of an employer wholly unrelated to his own has been held to be protected by Section 7, even though such activity usually entails only a partial refusal to perform work. *E.g., National Labor Relations Board* v. *Swain and Morris Construction Co.*, 431 F. 2d 861 (C.A. 9); *National Labor Relations Board* v. *Alamo Express, Inc.*, 430 F. 2d 1032, 1036 (C.A. 5); *Teamsters, Local 657* v. *National Labor Relations Board (Chemical Express, Inc.)*, 429 F. 2d 204 (C.A. D.C.).

---

[4] As the court below added (Pet. App. 5a, n. 4): "The kinship of Virginia Stage and Safeway distinguishes this case from *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71 (1953), and *NLRB* v. *L. G. Everist, Inc.*, 334 F. 2d 312 (8th Cir. 1964), which did not involve a common employer."

In *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 125 (Pet. 20), the Seventh Circuit held that employee refusals to cross a picket line were unprotected. However, the court relied, in part, on the fact that the employees who refused could have interfered with contract negotiations by their union representatives then in progress. The employees here were not represented by a union, so no similar problem exists. Moreover, insofar as *Illinois Bell* may be deemed to hold that such refusals constitute individual, rather than concerted, activity, the Seventh Circuit has subsequently rejected that view. See *National Labor Relations Board* v. *John S. Swift Co.*, 277 F.2d 641, 646 (C.A. 7).

Nor is review warranted of petitioner's further contention (Pet. 14-16) that the Board's order unduly impinges upon the employer's freedom to run his business.[5] Petitioner did not specifically raise this contention before the Board. See *Marshall Field & Company* v. *National Labor Relations Board*, 318 U.S. 253, 255. Moreover, the Board's order must be read in light of the principles applied in its decision. Under those principles, if the employee refuses to perform work which the employer believes is essential to the conduct of his operation, he is free to replace that employee with another who will do such work.

---

[5] In addition to a reinstatement and backpay provision (*supra*, pp. 5-6), the Board's order provides that Virginia shall cease and desist from discharging or otherwise discriminating against any employee "because he * * * has assisted a labor organization by refusing during the course of a strike to perform work which the strikers contend would normally be performed by them" (Pet. App. 23a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

National Labor Relations Board.

SEPTEMBER 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 443180 173

Supreme Court, U.S.
FILED
SEP 30 1971
E. ROBERT SEAVER, CLERK

No. 71-164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

VIRGINIA STAGE LINES, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

WARREN WOODS
LEONARD APPEL
BETTY SOUTHARD MURPHY
Suite 1032 Pennsylvania Building
425 13th Street, N.W.
Washington, D. C. 20004
Attorneys for Petitioner

Of Counsel:

WILSON, WOODS & VILLALON
Suite 1032 Pennsylvania Building
425 13th Street, N. W.
Washington, D. C. 20004

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-164

VIRGINIA STAGE LINES, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONER

The purpose of this reply brief is to invite attention to the Government's breach of minimum forensic standards and the legitimate bounds of advocacy in its opposition to our Petition. In their brief in opposition, counsel for the Board have subscribed to:

1. A gross misstatement of the question presented, that is demonstrably without any support in the four corners of the record or the pages of the Board's decision, and is completely incompatible with both; and

2. A gross inversion of our position as set forth in the Petition, which, ignoring all that appears there,

attributes to us a "basic contention" that is constructed from whole cloth (Brief For The National Labor Relations Board In Opposition, p. 6).

It is patently incorrect to assert, as counsel for the Board do (Brief in Opposition, p. 2), that the question raised is whether the Act prohibited the discharge of "two drivers who refused to cross a picket line" to perform their assignments. There was not an iota of evidence adduced nor any suggestion in the undisputed record that the employees in question ever engaged in a "selective refusal" or any refusal "to cross a picket line" (*Id.*, p. 6)), as made clear in our Petition, which stands unrefuted.[1] Incongruously, Board counsel, in flat self-contradiction, admit that "[D]uring the strike both willingly drove . . . even though this required their crossing the Safeway drivers' picket lines" (Brief in Opposition, Resume of "The Board's Findings of Facts", p. 4).

The matter is laid completely at rest, if more were needed, by the nature of the remote analogy to which the Board resorted in its decision, which recites that the dischargees' action in "refusing to drive" certain bus runs on occasion was "equivalent" to "their respecting the picket lines" (Petition, p. 10). If by employing

[1] *Union Carbide Corp.* v. *National Labor Relations Board*, No. 70-200—in which, the Board contends, a "similar issue is presented" (Brief in Opposition, p. 2)—is wholly inapposite. In *Union Carbide* the Board found that on "the first day of the strike" the employees involved upon "finding pickets at the gate, . . . decided to turn back", and that they later informed the employer that "their absence from work was due" to this circumstance. 70 NLRB 1425. The Court of Appeals, on this basis, held that "nonstriking employees who refuse as a matter of principle to cross a picket line maintained by their fellow employees" qualified for the protection of the Act. *National Labor Relations Board* v. *Union Carbide Corp.*, 440 F.2d 54, 55 (C.A. 4, 1971).

an analogy, the nonrecord facts associated with the purely analogous situation may be substituted blandly for those in the case at hand, there remain no litigation heights which counsel for the Board could not scale with the aid of this new found technique.

In a similar flight of fancy, Board counsel state that our "basic contention" here is that the employees' "refusal to cross the lines to perform" assigned work "was an unprotected partial strike" and address their opposition argument to this canard (Brief in Opposition, p. 6). Neither in this Court (nor in our brief submitted to the court below, were that material) did we raise or rely upon such an argument, which not only would have no bearing on this case, but is precluded by all that is set forth in the Petition.

While so diverted, Board counsel have made no effort to meet the serious challenge in our Petition to the exercise by the Board of unauthorized powers, in handing down with no explication a landmark cease and desist order, that is without precedent in Board annals. Instead, counsel seek technical refuge in the claim that we "did not specifically raise this contention before the Board" and hence are estopped from doing so in this forum. (Brief in Opposition, p. 8) This unsupported assertion is likewise untrue. The contention of unwarranted regulatory interference with managerial prerogatives was raised most explicitly in Petitioner's Brief to the Trial Examiner, whose decision the Board adopted *in toto*.[2]

---

[2] Apparently seeking the shelter of Section 10(e) of the Act ("No objection that has not been urged before the Board, its member agent, or agency, shall be considered by the court . . ."), Board counsel state:

> "Nor is review warranted of petitioner's further contention (Pet. 14-16) that the Board's order unduly impinges

With the Board's caseload reportedly at an alltime high, it is conceivable that its litigation staff may have confused the facts and issue in the case at bar with that in some other case arising under the Act. Whatever the nature of the disorientation, the representations to this Court advanced in the Board's opposition brief do not faithfully delineate the question presented, and thus impede consideration of the Petition on its merits, with the true issue to the fore. In these circumstances, the Board may wish to reassess its position, with a view to correcting the error committed.

Respectfully submitted,

WARREN WOODS
LEONARD APPEL
BETTY SOUTHARD MURPHY
Suite 1032 Pennsylvania Building
425 13th Street, N.W.
Washington, D. C. 20004

Attorneys for Petitioner

Of Counsel:

WILSON, WOODS & VILLALON
Suite 1032 Pennsylvania Building
425 13th Street, N. W.
Washington, D. C. 20004

September 1971.

---

upon the employer's freedom to run his business. Petitioner did not specifically raise this contention before the Board. See *Marshall Field & Company* v. *National Labor Relations Board,* 318 U.S. 253, 255."

To the contrary, Petitioner addressed to the Board a full-dress argument premised on the lengths to which the "Courts have gone . . . in defining an employer's right to conduct his business" (Petitioner's Brief To Trial Examiner, p. 27).